APPENDIX "A."

Filed Feb. 18, 1966

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 64C 3 (1)

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., and UNION BARGE LINE CORPORATION, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

Before MATTHES, Circuit Judge, HARPER and MEREDITH, District Judges.

HARPER, District Judge.

Memorandum Opinion

This action was brought under 28 USCA 1336 and 2284 on January 7, 1964, by the plaintiffs to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission (hereinafter referred to as the Commission), dated April 9, 1963, and December 19, 1963, and served April 24, 1963, and January 3, 1964, respectively, in Finance Docket 21193, *Pittsburgh Towing Company, Certificate Transfer—Charles Zubik,* which authorized transfer and issuance of Certificate W-364 to the Pittsburgh Towing Company.

Pursuant to 28 USCA 2321-2325, a three-judge court was constituted. On February 18, 1964, on its own motion, the Commission re-opened the hearing before it and this court stayed proceedings pending disposition of the matter by the Commission. In its decision dated March 19, 1965, the Commission, with four commissioners dissenting, approved

the transfer, but stayed the effect of its order until the termination of the proceedings before this court and the meeting of certain conditions by Pittsburgh.

Thereafter, on June 10, 1965, the plaintiffs filed an amended petition seeking to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963, and March 19, 1965, in said matter. On October 28, 1965, the court held its hearing in this matter.

Under 5 USCA 1009(e) the scope of our review of the Commission's orders is limited to a determination upon the whole record of whether the Commission's findings are supported by substantial evidence or whether its findings and conclusions are induced by misapplication of the law. If the Commission's findings are supported by substantial evidence and are in accordance with the law, they must be upheld. *Yourga* v. *USA,* 191 F. Supp. 373, 375, 376; *Universal Carrier Corporation* v. *NLRB,* 340 U.S. 474; *State Corp. Commission of Kansas* v. *USA,* 184 F. Supp. 691, 696.

Plaintiffs attack the orders of the Interstate Commerce Commission on the grounds that the orders are contrary to law and the Commission's transfer regulations, are based upon misrepresentations, are not supported by the facts essential to determine whether the transaction was lawful, and the failure to disclose essential facts in the application for transfer filed with the Commission on July 8, 1960.

This proceeding arose from an application filed on July 8, 1960, by Charles Zubik to approve the transfer of Certificate W-364 from himself to Pittsburgh. On September 9, 1960, the transfer was approved by order of the Commission based solely upon the application. Thereafter, plaintiffs filed a petition on October 24, 1960, for leave to intervene and for re-opening and vacation of the order of September 9, 1960, which petition was denied by the Commission on December 30, 1960, but on September 13, 1961, upon consideration of an additional petition by the plaintiffs, the

Commission re-opened the proceedings for further consideration and hearing, and stayed issuance of the certificate to transfer pending final disposition of the matter.

The plaintiffs were permitted to intervene, but the order of September 9, 1960, was not vacated. A hearing, in which the Bureau of Inquiry and Compliance participated, was held. The hearing examiner recommended that the order approving the transfer be set aside and the application be denied, but the Commission on April 9, 1963, affirmed the order approving the transfer.

The plaintiffs filed a petition for reconsideration, which was denied by the Commission on December 19, 1963, and on January 7, 1964, the suit in question was filed.

A brief statement of the facts concerning other matters disclosed by the record is pertinent at this point. Water Carrier Certificate W-364 was issued to Charles Zubik on January 18, 1943. Services under the certificate were suspended on or about July 31, 1950. During that year the certificate holder was relieved of the duty of filing annual reports until such time as operations were resumed. On November 3, 1959, the Pittsburgh Towing Company was incorporated in the Commonwealth of Pennsylvania for the purpose of conducting towing operations on inland waterways.

Edmond D. Osbourne was responsible for the incorporation of Pittsburgh and at the time of incorporation was one of the incorporators. Two hundred one shares of stock were issued at the time of incorporation, one hundred shares to Osbourne, one hundred shares to Douglas B. Myers, and one share to a Francis X. Wiget. On June 9, 1960, an option agreement was entered into between Charles Zubik and Edmond D. Osbourne, wherein for a consideration of $50.00 Zubik gave to Osbourne the exclusive right of option to purchase at any time prior to December 31, 1960, for a purchase price of $100,000.00 the water carrier certificate involved in this matter, provided the transfer was approved

by the Commission. The option agreement further provided that if Osbourne gave notice in writing to Zubik prior to December 31, 1960, of his election to exercise the option, Zubik would apply to the Interstate Commerce Commission for approval of the proposed transfer and assignment of the said water carrier certificate to Osbourne or his designee, utilizing such counsel as Osbourne might approve in seeking such transfer.

On June 29, 1960, Zubik, at Osbourne's request, amended the option agreement and assigned the Water Carrier Certificate W-364 to Pittsburgh, subject to approval by the Commission, with the understanding that upon the Commission's approval of the transfer Pittsburgh would issue to Zubik twenty-five hundred shares of its capital stock. This change in the agreement was made in an effort to facilitate the transfer of the certificate. Osbourne had until December 31, 1960, to exercise his option to purchase the twenty-five hundred shares from Zubik in exchange for the one hundred thousand dollars agreed upon in the option agreement of June 9th. As will be pointed out later, the reason for the injection of the corporate device in the manner in which it was done was a mere subterfuge to circumvent Commission regulations pertaining to transfer.

On July 8, 1960, when the application for the transfer was filed by Zubik, Paragraph 2(n) of the application stated that the transferee would be officered by Zubik, Osbourne and other persons. The record shows that Zubik at no time, neither before nor after transfer, was an officer of the corporation. Paragraph 2(o) of the application states: "Transferee is a new corporation which has been organized for the purpose of acquiring and operating the Certificate W-364 * * * ."

The record discloses that the corporation was organized in November of 1959, the agreement with respect to Osbourne acquiring the certificate was entered into on June 9, 1960, and that the corporation did not enter the picture

until June 29, 1960. The record further discloses that on June 8, 1960, the two hundred one shares of stock which at that time had been issued in the corporation were all owned by Osbourne, and that Zubik did not own any of said stock until September 19, 1960. The record further discloses that Zubik owned some eight towboats and four barges at the time of the application and that Pittsburgh owned no towboats, no barges, and had little, if any, capital.

On July 7, 1960, Zubik sent notices to all his supposed competitors, which notice read as follows: "This is to notify you that for personal reasons I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation, of which *I am* the owner, Pittsburgh Towing Company."

This statement to the effect that he (Zubik) was the owner of this corporation is completely refuted by the record, which shows that on that date Osbourne was the sole owner of the corporation. When the Commission on September 9, 1960, approved the transfer of the certificate it had not seen and was not aware of the option agreement of June 9, 1960, the amendment to the option agreement of June 29, 1960, the contents of the articles of incorporation showing the incorporators of Pittsburgh, nor the true facts with respect to the ownership of the Pittsburgh stock at said time. The Commission did not see the agreements between Zubik and Osbourne for the sale of this certificate until during the hearing held in this matter on March 27 and 28, 1962, when the Bureau of Inquiry and Compliance participated. Those documents were produced at that hearing by the parties, reluctantly, and over strenuous objection.

Transfer of water carrier certificates is provided for in 49 USCA 912, which reads in part: "* * * any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this chapter."

Pursuant to said section the Commission has promulgated regulations 49 CFR 306.1 through 306.10 pertaining to the transfer of water carrier certificates. 49 CFR 306.9, one of the said regulations, provides:

> "The transfer of any certificate or permit under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water carrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest."

The only offer that Zubik has ever made concerning circumstances causing the suspension of operations was the bare assertion in the application that the suspension was caused by "circumstances over which your petitioner had no control • • •." There was a complete void of any showing that the resumption of operations under the certificate would be in the public interest. Nevertheless, on September 9, 1960, the Commission granted its initial approval of the transfer "for good cause appearing therefor."

As was mentioned above, hearings on the application were twice re-opened, and the option agreements were disclosed. It was during these hearings that the questions concerning the cause of the suspension of the operations and Pittsburgh's fitness to maintain operations were raised. The Commission took official notice of the fact that business conditions were unfavorable for water carriers during the 1950's. This notice completely ignores a fact well taken by the dissenting members of the Commission that Zubik's competitors underwent the same unfavorable conditions during the 1950's, and are today operating profitably with no interruption of service during the difficult years.

The Commission's regulations provide that a required exhibit to be submitted with the application for transfer

is "a copy of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the proposed transfer * * *." 49 CFR 306.4(b).

Nothing could fit this description more clearly than the option agreements entered into between Zubik and Osbourne. It is the option agreements which contain the evidence showing the actual purpose for the transfer of the certificate to Pittsburgh. No reasonable reader of the record before the Commission and this court could come to any conclusion regarding the purpose of the application of transfer of Water Carrier Certificate W-364 other than that of transferring ownership of the certificate from Zubik to Osbourne and effectively circumventing the regulations of the Commission. The use of the corporate device and the transfer of the certificate to Pittsburgh was an attempt on the part of Zubik and Osbourne to transfer ownership of the certificate without subjecting themselves to the procedure specifically created for examining applications for transfer of ownership. Yet the Commission glossed over the fact that the option agreements were missing and not timely brought to its attention by stating that these agreements were not vital to the transfer.

Subsequent hearings resulted in a decision by a hearing examiner against the transfer and the Commission refusing to accept the findings and decision of the examiner.

This court cannot accept the Commission's refusal to heed its own regulations and the clear evidence of the attempt to deceive the Commission. Legislative regulations, created by a Federal agency pursuant to congressional authority, have the force of law. *Columbia Broadcasting System* v. *U. S.*, 316 U.S. 407, 417-419 (1942). The agency which promulgates the rule is as bound by its terms as is the general public. *Columbia Broadcasting System* v. *U. S.*, 316 U.S., 422; *McKay* v. *Wahlenmaier*, 226 F. 2d 35, 43. The Commission has itself held that it is bound by its rules. *United States Lines Co., Certificate Transfer,*

260 ICC 355, 358. Therefore, any action taken by the Commission is invalid unless the rules pertaining to the action are followed.

Besides the above-mentioned regulations concerning documents pertaining to the proposed transfer (49 CFR 306.4(b)), and a showing that the suspension of operations was caused by circumstances over which the certificate holder had no control (49 CFR 306.9), the applicant is required to submit "any additional information to show that the proposed transferee is fit, willing, and able *properly* to perform services authorized by the certificate or permit sought to be transferred." 49 CFR 306.3(o). (Emphasis added.)

There was a total absence of information in the application for transfer showing that Pittsburgh was in any way financially fit to carry on the operations authorized by the certificate. Nothing more than the intention of the supposed owner of all of the stock of Pittsburgh to make some arrangement appears in the application. Zubik stated that he was to be the holder of all of the issued and outstanding stock, when in truth he was not and never intended to be. Pittsburgh was Osbourne's corporation. The only connection with Pittsburgh that Zubik contemplated was a brief sojourn as stockholder while Osbourne purchased Zubik's stock, which he received in exchange for the certificate.

The Commission's reference to Pittsburgh's improving financial status is totally immaterial. So also is Zubik's temporary ownership of Pittsburgh stock after approval of the application. The Commission was required to view the parties at the time of the transfer application. Zubik concealed the options from the Commission as long as he could. The options changed the entire nature of the proceedings from a change in the *form* of ownership to a change in ownership. Totally different procedures and attitudes govern when change in the ownership of the

certificate is attempted. Zubik and Osbourne attempted to circumvent the regulations controlling the transfer of ownership of a certificate. Information was concealed from the Commission. The plan clearly was to transfer the certificate from Zubik, a sole proprietorship, to a corporation owned by Osbourne when the application was filed, and to be owned by Osbourne when the transfer was consummated.

The contention of Zubik, Osbourne and the Commission that this matter involves merely a change in the *form* of ownership completely ignores the option agreement with its obvious intentions. Deceit was perpetrated by Zubik in his letter to his competitors in July of 1960. The Commission allowed a concealment and violation of its rules in the application for transfer of the certificate on July 8, 1960. The Commission cannot ignore its own rules under the facts before it.

In view of the regulations and the record, the orders of the Commission approving the transfer of Water Carrier Certificate W-364 are hereby set aside and annulled.

A decree in accordance with this opinion may be submitted by the plaintiffs on notice unless consultation among the parties shall bring about a waiver of notice.

/s/ M. C. MATTHES
U. S. Circuit Judge

/s/ ROY W. HARPER
U. S. Circuit Judge

/s/ JAMES H. MEREDITH
U. S. Circuit Judge

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action 64 C 3(1)

MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN COMMERCIAL LINES, INC., and UNION BARGE LINE CORPORATION, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

Judgment and Decree of the Court

This cause came on for final hearing on the Complaint herein praying for a judgment to enjoin, set aside, annul and suspend Orders of the Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 thereby restraining the transfer of Certificate No. W-364 to Pittsburgh Towing Company.

Pursuant to Sections 2321-2325 of Title 28 of the United States Code a three-judge court consisting of the Honorable M. C. Matthes, Judge of the United States Court of Appeals for the 8th Circuit, and the Honorable Roy W. Harper and Honorable James H. Meredith, Judges of the United States District Court for the Eastern Judicial District of Missouri, Eastern Division was designated. The issues having been duly heard by and evidence having been heard before said Court, upon consideration duly been given to all the issues before said Court and a decision thereon having been duly rendered, and upon the finding by this Court that Pittsburgh Towing Company had failed to meet the requirements of the Defendant Interstate Commerce

Commission's regulations set forth in 49 C.F.R., 306.1 through 306.10 and Part 3 of the Interstate Commerce Act, 49 U.S.C. Section 901 et seq,

IT IS ORDERED, ADJUDGED AND DECREED:

1) That the Orders of the Defendant Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 are hereby set aside, annulled and suspended.

2) That the Defendant Interstate Commerce Commission is permanently enjoined from transferring water carrier certificate No. W-364 to Intervenor Pittsburgh Towing Company, as authorized by said orders.

M. C. MATTHES
United States Circuit Judge

ROY W. HARPER
United States District Judge

JAMES H. MEREDITH
United States District Judge

APPENDIX "B."

ICC

Service Date April 16, 1965

Finance Docket No. 21193

PITTSBURGH TOWING COMPANY—CERTIFICATE TRANSFER—
CHARLES ZUBIK

Decided March 19, 1965

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1. Upon reconsideration, findings in the prior report, 317 I.C.C. 661, amplified and affirmed. Provision made for issuance of a certificate to the transferee superseding the certificate transferred. Conditions prescribed.
2. Petition of transferee to vacate and set aside the order reopening the proceeding for reconsideration, denied.

Appearances as shown in the prior report.

Report of the Commission on Reconsideration

WALRATH, *Commissioner:*

Issuance of a water carrier certificate of public convenience and necessity to the transferee superseding the certificate transferred in this proceeding was temporarily enjoined by the United States District Court for the Eastern District of Missouri, Eastern Division, in Civil Action No. 64 C 3(1), *Mississippi Valley Barge Line Company* v. *United States.* Subsequently, on its own motion, on February 18, 1964, Division 3, acting as an Appellate

Division, reopened the proceeding, which was recalled by the Commission at the request of the Division because of the policy matters involved regarding the transfer of water carrier certificates. On March 10, 1964, transferee filed a petition to vacate and set aside the order of February 18, 1964, to which interveners[1] replied. A stipulation has been lodged with the court that, if we affirm approval of the transfer, the proceeding will be stayed until the further order of the court, and the temporary injunction has been dissolved. In view of the stipulation and our conclusions, transferee's petition will be denied.

This proceeding arose from an application filed July 8, 1960, jointly by Charles Zubik, for himself, transferor, and Charles D. Osbourne, managing director, for Pittsburgh Towing Company, transferee, both of Pittsburgh, Pa., for approval under section 312 of the Interstate Commerce Act and the regulations thereunder,[2] hereinafter called the transfer regulations, of the transfer of the certificate dated January 18, 1943, issued to the transferor in No. W-364.

The certificate in question authorizes operation as a common carrier by towing vessels, in interstate or foreign commerce, in the performance of general towage between ports and points on the Ohio, Youghiogheny, Allegheny, Monongahela, and Kanawha Rivers.

The transferor had suspended operations subject to the act after World War II, although his towboats had been operating around Pittsburgh. He had been relieved in 1950

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[1] American Commercial Barge Line Company, Mississippi Valley Barge Line Company, and Union Barge Line Corporation.

[2] Rules and Regulations Governing Transfers of Certificates and Permits to Operate as a Water Carrier in Interstate or Foreign Commerce, contained in the Commission's order of August 4, 1943 (49 CFR, Part 306), section 306.4(f) of which was added by order of May 3, 1950, now superseded by order of October 31, 1963, which deleted said section and amended section 306.6(b) and (c).

from filing reports until such time as operations subject to the act were resumed. The transferee was a new corporation organized for the purpose of acquiring the certificate and operating thereunder. The transaction did not require approval and authorization under section 5(2) of the act. No representations in the proceeding had been made by State authorities. Competing water carriers had been notified, and no objection to granting the application had been presented. No hearing was deemed necessary.

The transfer was approved by order of the Commission, Division 4, dated September 9, 1960. Consummation was effected on November 17, 1960, and evidence of the transfer was filed, as provided in the order. Section 306.6(e) of the transfer regulations provides that, upon receipt of such evidence, an appropriate certificate superseding the certificate transferred will be issued.

After the prescribed period for filing petitions had expired and the order of September 9, 1960, had become effective, competing water carriers named in footnote 1 were stirred to action by transferee's publication of towing rates lower than theirs, to become effective upon consummation. They filed a petition, dated October 24, 1960, for leave to intervene and for reopening and vacation of the order of September 9, 1960. The petition was denied by order of the Commission, Commissioner Tuggle, dated December 30, 1960, but, by order dated September 13, 1961, upon consideration of additional petitions by the same carriers, and reply by transferee, Division 3 reopened the proceeding for further consideration and hearing, and stayed issuance of the certificate to transferee pending final disposition of the matter. Petitioners were permitted to intervene, but the order of September 9, 1960, was not vacated. A hearing, in which the Bureau of Inquiry and Compliance participated, was held. The hearing examiner recommended that the order approving the transfer be set aside and that the application be denied.

In the report, 317 I.C.C. 661, decided April 9, 1963, herein called the prior report, after hearing and further consideration, a majority of Division 3 affirmed the order by Division 4 approving the transfer. A petition of interveners for reconsideration was denied by an order of Division 3, acting as an Appellate Division, entered December 19, 1963. On or about January 8, 1964, one of the interveners filed the above-mentioned suit to enjoin, set aside, annul and suspend the orders of April 9, 1963, and December 19, 1963.

Interveners claim that errors were committed (1) by Division 4, prior to hearing, in finding transferee fit, willing, and able properly to perform the service authorized by the certificate, based on information and evidence submitted with the application; and in taking official notice that transferor's suspension of operations was due to circumstances beyond his control; (2) by Division 3, upon hearing and further consideration, in failing to consider the application *de novo,* wholly disregarding the prior approval and consummation and equities arising therefrom; in concluding that approval was not induced by misrepresentation of the nature of the transaction or of transferee's financial resources; in concluding, apropos of transferee's fitness, that its method of operation had not been shown to be unlawful (though this was not an appropriate proceeding in which to determine the question); and (3) by both Divisions, in failing to require a showing that reactivation of the long-suspended operations by transferee would meet a public need not otherwise being adequately met.

The pertinent facts are set forth in some detail in the examiner's report and in the prior report, and will be restated here only to the extent necessary for clarity of discussion.

Evidence submitted with the application included an assignment by Zubik, dated June 29, 1960, of the certificate in question to transferee, subject to approval by the Commission of the transfer. Information furnished was to the effect that transferee was organized November 4, 1959, with an authorized capital stock of 5,000 shares; that 2,500 shares would be issued to Zubik as compensation for the certificate; and that all or part of the remaining 2,500 shares would be sold and proceeds therefrom used to obtain necessary towing power units and other equipment. The stock had not been issued, officers had not been elected, and transferee would not be a carrier until the transfer of the certificate was approved. Officers and directors would not have any interest, control, or affiliation with any other common carrier subject to the jurisdiction of the Commission. Formal resolutions of stockholders or directors had not been adopted since Zubik would be the holder of all of the stock issued and outstanding on the date of consummation. It was stated that transferee would have as officers Zubik, Osbourne (who holds a master's certificate), and other persons experienced in the profession of river navigation. Zubik owned 8 towboats and 4 barges. Transferee proposed to acquire modern towing power units, but it was not known, with certainty, at that time from whom the units would be acquired. As the cause of suspension of transferor's operations, economic conditions were mentioned, and applicants asked that the rights be transferred and placed upon an active operating basis, and that the previously mentioned relief from filing reports be vacated.

At the bottom of the controversy in this proceeding is Zubik's notice to competitors, dated July 7, 1960. The controversy has caused the cross-filing of more than 30

pleadings by interveners and applicants, two rate proceedings,[3] two antitrust proceedings,[4] and the afore-

Section 306.4(f) of the transfer regulations, as amended May 3, 1950, required a showing that notice of the filing of the application had been served upon all known water-line competitors. No form for the notice was prescribed, and applicants made the required showing. This provision has since been deleted by order of Division 3, effective January 1, 1964, and pursuant to amended section 306.6(c), in those proceedings in which no oral hearing is held, if the application is approved, prior to the effective date, a synopsis of the order of approval (composed by the Com-

[3] *Towing Rates between Points on the Ohio River,* 315 I.C.C. 583, decided February 14, 1962, in which transferee's schedules were found not shown to be just and reasonable; and *Towing Rates, Pittsburgh Towing Company,* 321 I.C.C. 366, decided November 22, 1963, in which increased bargeload towing rates, when applied in connection with exclusive use of outside towing, were found to be just and reasonable and otherwise lawful.

[4] Docket No. 34155, *Pittsburgh Towing Company* v. *Union Barge Line Corp. et al;* and Civil Action No. 63-208, *Pittsburgh Towing Company and Edmund D. Osbourne* v. *Union Barge Line Corp. et al.,* in the United States District Court for the Western District of Pennsylvania. The former, alleging conspiracy under the antitrust laws to destroy transferee, was dismissed by the Commission, Chairman Walrath, by order dated March 11, 1963, at the request of transferee-complainant. The latter, alleging similar antitrust violations, was dismissed by the court January 21, 1964, for the reason that the allegations should be determined initially by the Commission under the primary jurisdiction doctrine.

mentioned suit.

mission) is published in the Federal Register.[5] Section 306.6(b) has further been amended to require applicants to serve copies of the applications on the Governors of the States in which any port or point served by the transferor is located, rather than to supply copies to the Commission to make such service.

Zubik, who neither reads nor writes, except his name, relies on assistants, particularly his young daughter, to read to him. The language of the notice was chosen by him from several drafts prepared and read to him by Osbourne, as follows:

> This is to notify you that for personal reasons, I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation of which I am the owner, Pittsburgh Towing Company.

Based on the application and additional facts disclosed at the hearing, the notice might have read somewhat as follows (it is not intended to imply that such a detailed notice was required):

> This is to notify you that for personal reasons, I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a new corporation, Pittsburgh

[5] If the regulations, as amended, effective January 1, 1964, had been effective when the application was filed herein, in lieu of the notice described below, a synopsis of the authority granted would have been published in the Federal Register substantially as follows: By order of September 9, 1960, Division 4 approved the transfer to Pittsburgh Towing Company, Pittsburgh, Pa., of the operating rights in Certificate No. W-364, issued January 18, 1943, to Charles Zubik, also of Pittsburgh, authorizing operation as a common carrier by towing vessels, in interstate or foreign commerce, in the performance of general towage between ports and points on the Ohio, Youghiogheny, Allegheny, Monongahela, and Kanawha Rivers. Applicants' attorney: Ernie Adamson, Box 62, Middleburg, Va.

Towing Company, organized for the purpose of acquiring and operating the certificate, which will issue to me the first 2,500 shares of its authorized capital stock of 5,000 shares, as compensation for the certificate.

The new corporation, which will not become a carrier until this transfer is approved, will be managed by Edmund D. Osbourne, who does not have any interest, control or affiliation with any other carrier subject to the jurisdiction of the Commission. He hold's a master's certificate and is experienced in transportation of property by water for hire. He has discussed this matter with the Commission's staff, and he is better qualified than I to direct this operation.

I have granted him an option to purchase my shares after approval of the transfer for $100,000 payable $10,000 in cash following exercise of the option, prior to December 31, 1960, and the balance in seven equal consecutive annual installments.

The corporation does not own or lease any vessels or other transportation facilities at this time. However, it proposes to acquire by lease, charter or purchase several modern towing power units, a major portion of the necessary funds for which is proposed to be obtained from the sale of part or all of the other authorized but unissued stock.

Osbourne purchased Zubik's stock in transferee on December 31, 1960. Interveners' position is that the intended Osbourne ownership of transferee raised questions of fitness and ability and of public interest not raised by Zubik ownership, and that had they been notified that, after the transfer, transferee would be Osbourne-owned, they could have successfully opposed the application, not that an Osbourne-owned transferee could do anything that a Zubik-owned (and Osbourne managed) transferee could not have done, or that an Osbourne-owned reactivation of the rights would affect, or has affected, their operations competitively, if at all, any differently from an Osbourne-managed Zubik reactivation. The essential futility of interveners' position will be considered later. Intervenors

position assumes that they were entitled, as of right, to notice of Osbourne's intentions, and that, if they had timely filed a protest, they would have been entitled to an oral hearing. Neither assumption is correct. They are based on a misconception of the nature of transfer proceedings not subject to section 5.

The failure of the order of September 13, 1961, reopening the proceeding, to describe the purpose of the further consideration and hearing doubtless gave rise to some misunderstanding. It seems apparent that the primary purpose was to determine whether approval had been obtained through misrepresentation or other fault of transferee or Osbourne and should be set aside.

The circumstances of this particular transfer may better be appreciated in the light of certain policy matters involved in transfers of operating rights not subject to section 5, with particular reference to transfers of water-carrier certificates. Many such transfers, and many more similar transfers of motor-carrier operating rights under section 212(b), and of freight-forwarder authority under section 410(g), and rules and regulations prescribed under each section (see 49 CFR 179 (motor carriers) and 49 CFR 415 (freight forwarders)), have been approved, but few decisions by the Commission or the courts dealing therewith have been printed. It may be well, therefore, to examine some of the attendant procedures and practices, and the interests which carriers other than the immediate parties to such transfers may have therein.

The nature and limitations of transfer proceedings. When part III of the act was enacted in the Transportation Act of 1940, and section 5(13) was amended to include water carriers subject to that part, Congress provided in section 312 for the transfer of water-carrier certificates, under regulations to be prescribed, in transactions not subject to section 5, as follows:

> Except as provided in this part, any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part.

The language of section 312 is similar to that used in section 212(b) of the Motor Carrier Act, 1935, and its intent was doubtless similar, namely, to facilitate transfers not subject to section 5. Section 312 does contain the words "for the protection of the public interest," not contained in section 212(b), but these words would appear to amount to the expression of the same Congressional intent implied under section 212(b), "that operating rights might be freely transferred so long as the public interest was not harmed thereby." See *Stearn* v. *United States*, 87 F. Supp. 596, 601 (1949).

Since the statutory language is essentially similar, the transfer regulations under section 312 are similar to those under section 212(b).[6] Each requires that applicants make specified showings, principally that transferee is fit, willing, and able properly to perform the service authorized by the certificate sought to be transferred and to conform to the requirements of the act and the Commission's regulations.

In acting on transfers not subject to section 5, the Commission depends mainly on information and evidence submitted by applicants. Rule 1.40 of the General Rules of Practice requires protests against applications to be filed promptly and as here pertinent permits the disposition of applications to be made without regard thereto. Transfers are not required to be determined on a record after opportunity for hearing. Under the prescribed regulations, the Commission determines whether or not a hearing is necessary. Hearings are rarely assigned.

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[6] Rules and Regulations Governing Transfers of Rights to Operate as a Motor Carrier in Interstate or Foreign Commerce (49 CFR 179).

In Civil No. 2431, *Brooks Transportation Co., Inc., et al.* v. *United States,* decided May 13, 1957, where the United States District Court for the Eastern District of Virginia was considering whether competing carriers were entitled to any notice, hearings, or other procedural steps, as of right, under section 212(b), the court said:

> [T]he Congress evidently thought the public concern to be too slight to demand the close scrutiny of a full-dress inquiry. For these cases an ex parte application, under the supervision of the Commission, was deemed adequate. This construction of the Act is underpinned by its legislative history and is confirmed by the practice of the Commission for more than a score of years. * * * [P]rior notice of, and participation in, the small transfer proceeding need be accorded only to the immediate parties. If other persons are not entitled to take part originally, they would not logically be entitled, as of right, to subsequent participation and stay.

All transfers under section 312 and most transfers under section 212(b), are made to new, non-carrier entities. The transferee acquires only such rights as the transferor possessed. A heavy case load of proceedings under other sections, having a greater impact on the public interest than such transfers, and a need to make reasonably quick determinations, imposes practical restrictions on the time, resources, and staff which can be devoted to individual applications. Unnecessary duplication of effort must be avoided, and discretion to reopen such proceedings and assign hearings must be used sparingly. Bureau participation must necessarily be limited to those which present serious questions of fitness of the new entities. If competing carriers are permitted to intervene, the doctrine that they are admitted to the proceeding as it stands, and in respect of the pending issues, but are not permitted to enlarge those issues or compel an alteration of the nature of the proceeding, applies. *Vinson* v. *Washington Gas Light Co.,* 321 U.S. 489.

Section 5 standards and burden of proof are inapplicable. Section 5 is principally concerned with the bringing under control or management in a common interest of two or more carriers, and a showing that the proposed transaction "will be consistent with the public interest" is required.

When a proceeding determined under section 5 was before the court in *Virginia Stage Lines, Inc.* v. *United States,* 48 F. Supp. 79 (1942), it said, "It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than section 5." But in *Stearn* v. *United States, supra,* where the court was considering an order entered pursuant to section 212(b) and the rules and regulations prescribed thereunder, it declared:

> But where Congress has entrusted an administrative agency to carry out the purposes of a statute under rules and regulations prescribed by the agency, there is a necessary implication that such rules and regulations must be consistent with the purposes of the statute and reasonably adopted to carry out those purposes; that they must not be contrary to or go beyond the Congressional intent. The broad language "such rules and regulations as the Commission may prescribe" is not an authorization to adopt any rule the Commission may fancy.

In dealing with the same section, the Supreme Court stated in *United States* v. *Resler,* 313 U.S. 57 (1941), "Undoubtedly the power to prescribe regulations is not unlimited."

In *Atwood's Transport Line—Lease—John A. Clarke,* 52 M.C.C. 97 (1950), referred to with approval in *County of Marin* v. *United States,* 356 U.S. 412 (1958), it was concluded:

> [I]n our opinion, the Commission may not, through its power to prescribe rules and regulations under section 212(b), in effect, legislate the provisions of section 5 into those transfer rules. It is for the Congress to enact legislation, and it has seen fit to draw a definite

> line of distinction between transfers of certificates not involved in a transaction which is subject to section 5, and the control of two or more motor carriers * * * subject to section 5, where the transfer of a certificate may be involved.

Whether a transfer of rights would have been denied had it been a transaction subject to section 5 is irrelevent in a transfer proceeding. Approval or disapproval of a transfer depends solely upon conformance or nonconformance with the transfer rules and regulations. See *Wooton—Purchase—Columbia Truck Exp.*, 49 M.C.C. 586 (1949).

Transfer of dormant rights. In the case of abandoned or suspended water-carrier operations, section 306.9 of the transfer regulations, contained in the order of August 4, 1943, by Division 4, requires—

> a showng that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water-carrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest.

The order of August 4, 1943, includes certain provisions applicable to transfers effected in section 5 proceedings, others specifically applicable only to transfers not subject to section 5, dual provisions, and others about which there has been considerable question, particularly the above-quoted section 306.9. Although undoubtedly the rule was initially intended to require an additional showing, or perhaps an alternative[7] showing to one that the suspension

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[7] Where operations by transferee are shown to be consistent with the public interest, the reason the transferor discontinued operations should not be material. The rule seems to demand more than is required by the statute in connection with a transaction under section 5.

of operations was caused by circumstances over which the transferor had no control, whether the intention was to require the same showing in both proceedings is not clear. If such was the intention, the effect has been modified by subsequent decisions that the rule has no substantive application under section 5. See *Pan-Atlantic S.S. Corp. —Purchase—Agwilines, Inc.,* 85 M.C.C. 485, 489. Also, decisions interpreting the motor-carrier transfer rules have cast doubt on our power to require such showing in transfers not subject to section 5.

The provisions of section 306.9 were derived from a *former* motor-carrier transfer rule (1938 edition), under section 212(b), which required—

> a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control, or that the motor carrier operations authorized under the operating rights sought to be transferred are required in the public interest.

The motor-carrier rule was revoked, effective December 1, 1943. After several years, a new motor-carrier rule was prescribed, effective October 30, 1950, which provided for the transfer of dormant operating rights—

> only upon a showing that the cessation of operations was caused by circumstances over which the holder of such operating rights had no control.

Under that rule, in Civil Action No. 5885, *Gay* v. *United States,* decided May 16, 1955, the United States District Court for the Western District of Oklahoma held that the Commission could not deny an application where the lack of operations was caused solely by lack of demand for the services of transferor.

The motor-carrier rule has been further revised, as section 179.5(b), effective November 1, 1960, and now reads as follows:

> The mere cessation of operations by the holder of an operating right shall not be deemed to require denial of the proposed transfer of such right. If, however, a cessation of operations has occurred, which fact shall be stated in the application, and operations have not been conducted under the considered rights for a substantial period of time, the proposed transfer will be denied unless the holder shows that such discontinuance was caused by circumstances over which he had no control. The Commission may require, in an appropriate case, proof of the nature and extent of operations conducted under the operating rights for a period of 6 months preceding the date of the request for such evidence.

Part III does not provide revocation authority and procedures such as are found in part II and part IV of the act. In *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), the Supreme Court indicated that we are without authority to revoke water carrier certificates or permits in whole or in part, once they have become effective and the time fixed for requesting rehearing or reconsideration has passed. We have recommended to the Congress for 18 years that provisions for revocation for nonuse be added to part III. Bills to implement the recommendation have been introduced, but no such measures have been enacted.

There are a number of water-carrier certificates and permits outstanding which are not being used, and some have been dormant for more than 20 years. In our 61st Annual Report to Congress, dated November 1, 1947, first recommending inclusion of authority to revoke water carrier operating rights for nonuse, we stated:

> *Probably in many such instances the nonuse is not willful but due to conditions which may reasonably be regarded as beyond the control of the holders.* Changes in economic conditions since the beginning of the war have materially affected the operations of many water carriers and their ability to provide service. How long these conditions may continue cannot be forseen. * * *

> *We believe that water carriers should have reasonable protection against loss of their operating rights where abnormal or special conditions have hindered resumption or continuance of operations.* However, we do not believe it to be in the public interest that certificates and permits be wholly beyond administrative scrutiny and control. Accordingly, consideration should be given to the desirability of amending part III of the act by adding thereto revocation provisions similar in substance to those in section 212(a) of part II and section 410(f) of part IV. [Emphasis supplied.]

Operations under dormant rights may be revived by the holder at any time. Where the holder is a corporation, its stock can be (and has been in some instances) sold to new interests. Where the new interests are not a carrier or a person affiliated with a carrier, there is nothing the Commisison can do with respect to such revival. Because no showing can be required of such interests to revive the operations of corporate holders, any showing of public need the Commission might require to revive other operations could be unreasonable and unjust to noncorporate holders. Moreover, as the latter may incorporate, one way or another, in any situation not subject to section 5, the stock can be sold and any such requirement circumvented.

Many transfers are, as stated by the Supreme Court in *County of Marin* v. *United States, supra,* "little more than a paper transaction," and do not justify regulation substantially as if the transaction were subject to section 5. Even if we look beyond the transfer to a proposed change in the control of transferee not subject to section 5, our jurisdiction extends only to the transfer and determination of whether the *transferee* is fit, willing, and able properly to perform the service authorized by the certificate sought to be transferred and to conform to the requirements of the act and the Commission's regulations.

As seen, unlike the motor-carrier rule, the water-carrier rule has not been formally revised. The revision appears

overdue and will be undertaken in an appropriate proceeding.

The prior report. Turning now to this transfer, Division 3 stated that it was applying the following standards in determining whether the transfer should be set aside (317 I.C.C. at 666):

> Our reopening the proceeding for hearing and further consideration did not mean that we would determine the application *de novo,* disregarding the fact that no one seasonably opposed the transfer, that no showing of a need for the operations was required prior to approval, that the transfer had been approved and consummated in accordance with the terms of the order of September 9, 1960, that operations were being conducted pursuant to such approval, and that third persons have relied thereon in dealings with transferee. In the circumstances, to set aside the order will require clear and convincing evidence that approval of the transfer was induced by willfully misleading evidence in regard to a vital matter.

The above qoutation must be read in conjunction with the following from page 668:

> If the order approving the transfer was properly entered, and the conditions for issuance of the certificate in the name of transferee were fully complied with, the certificate became vested in transferee, and the Commission is without power to revoke any water carrier certificate.

The Division at that point was referring to interveners' contentions concerning transferee's operating practices, occurring after the transfer. The refusal by the Division to determine the case *de novo* related principally to issues raised by those contentions.

The most important part of the inquiry is stated in the paragraph following the above quotation from page 666—whether the actual plan would have warranted denial:

> The first question to be resolved is whether applicants purposely presented a plan of transfer and operation such as to warrant approval and thereafter proceeded with acts so inconsistent with the announced plan that, if originally stated, they would have warranted denial of the transfer. We cannot find that they did.

The emphasis is not on whether misrepresentation was willful, but whether the intended actions, if fully disclosed, would have been disapproved. Whether a misrepresentation or nondisclosure was willful would, of course, reflect upon the character or fitness of the applicants and would therefore be material. The Division found no misrepresentation as to the nature of the proposed transfer or as to transferee's fitness. Division 4 had known, as competing carriers also should have known, that after the stock was issued, Zubik could sell the stock. Division 3 recognized applicants' lack of candor in regard to Osbourne's intentions to acquire control of transferee but found, in effect, that it did not affect a "vital" matter. "Vital," not "material," is the correct word in the context. It connotes something that is not only material to the application but also material to the issues in the reopened case; in other words, a matter which, if fully disclosed in the application, would have caused Division 4 to deny the transfer.

The facts in *Abco Moving & Storage Co., Inc.—Purchase —Dierking,* 47 M.C.C. 557, on which interveners rely, are distinguishable from those here present, and that decision is not a precedent for vacating and setting aside the order.[8]

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[8] That proceeding was initiated prior to the Administrative Procedure Act, and accordingly was not governed by the second sentence of section 9(b), which reads: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.

The undisclosed real party in interest in that case had been the subject of numerous complaints in the conduct of another transportation business; moreover, on rehearing and a showing that his conduct had improved, that transfer was approved. See 52 M.C.C. 131. Contrary to the situation there, Osbourne's qualifications and participation in the management of transferee were presented in the application. In fact he was more "fit, willing, and able properly to perform the service authorized by the operating rights sought to be transferred" than was Zubik. Nondisclosure, much as it is to be deplored, is tempered by the nature of the facts not disclosed and an apparent absence of bad faith.

Transferee's financial condition. As of February 28, 1962, transferee showed a deficit in its capital stock and surplus account of $50,711, and its current liabilities exceeded current assets by approximately $6,895. Its income statement for a period of 5 months beginning October 1, 1961, showed operating revenues of $206,015 and deficit of $18,577. However, after eliminating expenses of $31,754 which accrued in the previous year, and deducting income of $5,000, which was incorrectly included in its income statement, transferee actually had a net income of $8,177 for said 5-months period. As previously indicated, it had then been in operation a total of less than 16 months.

In its reply to interveners' petition for reconsideration, transferee offered to demonstrate its improved financial condition as of May 31, 1963, profitable 1963 operations, and plans to build a modern automated tow boat upon favorable terminaton of this litigation. Upon motion by interveners, by the order of December 19, 1963, the material not of record was stricken.

Transferee's method of operation. This was described in the prior report as follows:

> Transferee advertises its general towage services in trade publications and maintains day-to-day contact

with tug owners. It issues bills of lading, which describe the shipper's barges and usually also the cargo, but it does not undertake to furnish a specific tug. Upon notice that a shipper's barges will be ready for movement, it arranges for appropriate service. While the shipper's barges are in tow, it obtains position reports by radio from the tug owner or master. It maintains hull insurance and protection and indemnity coverage against collision and other possibilities of liability. When an outside tower is hired, compensation is in miles per cargo ton-mile, with empty movements in cents per empty barge-mile, in accordance with the custom of the trade. Prior to April 1961 transferee relied exclusively on purchased towage. From that date to the hearing, it chartered a total of 8 tugboats, of which from 1 to 3 were effective at one time, the last of which was the *Charles Zubik*. Six of the vessels were chartered orally or on invoice on a per diem or monthly basis. Others were in writing. The vessel owners or masters employed the crews and paid operating and maintenance expenses.

Interveners' arguments were set forth as follows:

Interveners argue, and the examiner concluded, that transferee had no water carrier operations to which the towage service performed for it by others was incidental; that without such operations, the use of outside towing is illegal; that such use is justified only in an emergency, or occasionally, and incidental to an actual bona fide transportation operation; and that Osbourne's persistent and continuous "misinterpretation" of section 303(f)(2) as leaving the matter of ownership or operation of towing vessels to economic considerations raises serious questions as to transferee's fitness. Applicants submit that interveners' interpretation is erroneous, but nevertheless transferee's hiring of outside towage during the first several months of operation met emergency conditions, referring particularly to problems involved in organizing, financing, equipping, and reactivating the operation.

After pointing out again that the issue here is whether the order of September 9, 1960, was properly entered, the Division stated that this was not a proper proceeding to determine whether exclusive reliance on outside towage is unlawful, and that, indeed, if it were found to be, only an order to compel compliance, not a revocation of operating authority, would issue. Apropos of transferee's fitness, the Division stated:

> We are not here required to decide whether, if transferee had proposed to pursue the described method of operation indefinitely and exclusively, the transfer would not have been approved. Suffice to say that t did not and does not propose to so operate. When the transfer was approved, transferee was a new corporation. It was controlled and managed by personnel well qualified and experienced in water transportation. It proposed to acquire, as soon as possible, necessary towing power units and other equipment, and in this connection, to issue additional stock. We are unable to state at this date that it would not have performed as proposed had interveners not sought to set aside the transfer. While the series of pleadings described in the examiner's report were under consideration, and since the proceeding was reopened, it would have been imprudent to make a further offering of transferee's stock, to contract for the purchase or construction of a towboat, or even to enter into long-term charters.

In their petition for reconsideration, interveners contend that refusal to rule that transferee's "exclusive" reliance on outside towage is unlawful is arbitrary, inconsistent with the order reopening the proceeding, violates due process requirements of adequate notice, constitutes agency action unlawfully withheld, deprives them of their right to review by the court, and is erroneous. Their arguments in support of their position that exclusive reliance on outside towage is unlawful do not differ materially from those previously made. They have little relevancy to the facts and issues in this case. However, if, as interveners suggest, exclusive reliance on outside towage constitutes

brokerage service rather than common carriage, no broker's license is required under part III, and as indicated, it is not illegal not to use a water carrier certificate as a common carrier.

Interveners contend that, regardless of the motives and purpose in reopening this proceeding, and regardless of whether there was any misrepresentation, we could exercise a continuing control and jurisdiction over transferee, its fitness, and method of operation under the authority transferred under section 312 until an appropriate certificate superseding the certificate transferred is issued. Such action would doubtless make the acquisition of vessels and the making of necessary financial arrangements more difficult and might result in more onerous terms to transferee. The conditions, if any, upon which a certificate shall be issued to a transferee ordinarily should be stated in the order approving a transfer, as in any other order authorizing the issuance of a certificate.

Orders approving transfers under section 312 and the transfer regulations are subject to section 315 of the act and section 9(b) of the Administrative Procedure Act. Section 315(d), as it applies to such orders, provides that orders which have become effective shall continue in force in accordance with the terms thereof, unless suspended, modified or set aside. Section 315(c) authorizes the suspension, modification, or setting aside of orders by the Commission "upon such notice and in such manner as it shall deem proper." Section 9(b) of the Administrative Procedure Act, as it applies to such orders, prohibits suspension or revocation, "[e]xcept in cases of willfulness or those in which public health, interest, or safety requires otherwise," before transferee has been notified of the facts or conduct which may warrant such action and been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Thus, it is clear that, if this were some such precertificate investigation of transferee's

financial fitness or operating practices, as interveners suggest, we would not be justified in setting aside approval of the transfer without affording transferee an opportunity to achieve and demonstrate compliance, unless its conduct was willful or its operations were an imminent hazard on the waterways. There is no evidence of the latter, and even if its conduct were willful in point of law, summary withdrawal of approval and reversion of the operating rights to the transferor would not necessarily be the proper course of action. Even under part II, where we may revoke a certificate after hearing and investigation, we may do so only for willful failure to comply, and then only if the holder willfully fails to comply within a reasonable time, not less than 30 days, fixed by us, with a lawful order commanding obedience. Compare *Ace Lines, Inc., Suspension or Revocation of Certificates,* 76 M.C.C. 667.

Discussion and Conclusions. As indicated, there is considerable futility in interveners' position, and, indeed, in any regulations relating to dormant rights, and there will continue to be until Congress sees fit to write part III revocation power into the law. If Division 4 had withheld approval, or if we were to set aside the order of September 9, 1960, the certificate in question would revert to Zubik and could not be revoked. Operations thereunder have been revived and could be continued under Osbourne's management, or again transferred under section 312. There would be no reason why Osbourne, as manager, would file rates different from those filed by Osbourne, as managing director. The rates, which interveners have protested, have been found, in *Towing Rates, Pittsburgh Towing Company, supra,* to be just and reasonable and otherwise lawful, when applied in connection with exclusive use of outside towage.

If exclusive reliance on outside towage were determined to be unlawful or not common carriage, a contrary position could not be deemed completely unreasonable, in bad faith,

and no finding of unfitness based on such a method of operation would be warranted. We could not, in the absence of revocation or suspension power under part III, enforce a requirement that transferee, or Zubik, or others employing the same method of operation, perform common carrier service. Compare *Performance of Motor Com. Car. Service by Riss & Co., Inc.*, 48 M.C.C. 327, 49 M.C.C. 111.

Under the transfer regulations in effect when Division 4 approved the transfer, there was no valid reason for withholding approval of the transfer. Transferor's suspension of operations was properly regarded as caused by circumstances over which he had no control. If the proposals described in the application were carried out, transferee would be fit, willing, and able to perform the general towage service authorized by the certificate and to conform to the requirements of the act and the Commission's rules and regulations thereunder.

Interveners were not entitled, as of right, to notice of Osbourne's intentions to acquire Zubik's stock in transferee. The statute does not require any notice to competing carriers and opportunity to be heard in regard to any transaction not subject to section 5. Neither the transfer of the certificate to transferee nor Osbourne's acquistion of control of transferee through purchase of its stock was a transaction subject to section 5.

The evidence does not show that transferee's operations have had any material adverse effect on interveners, the smallest of which has annual gross freight revenues 16 times as great as transferee's.

The option agreement between Osbourne and Zubik should have been filed with the application under section 306.4(b) of the transfer regulations, but the omission, rectified at the hearing, does not require that the order of September 9, 1960, be set aside. Disclosure of the option

would not have required a hearing or disapproval of the transfer.

We need not and we do not decide whether transferee is operating as a common carrier when it relies exclusively on outside towage. We decide only that transferee's method of operation does not warrant a finding of unfitness, and transfer of a certificate to an unfit transferee was not authorized. Even if transferee's financial ability to continue operations were doubtful, and we do not believe that it is, we would not be justified in setting aside the transfer forthwith. We agree with the conclusions in the prior report that postponement of performance on transferee's proposals to obtain additional capital and acquire by lease, charter, or purchase, suitable vessels and other facilities has been a product of the uncertainties attendant on this proceeding. As indicated, notwithstanding our action, a certificate cannot be issued to transferee because of the stipulation entered in the suit to review the orders of April 9, 1963, and December 19, 1963, by Division 3. In the circumstances, we believe the proper course is to accord transferee an opportunity, following termination of the current controversies, to demonstrate that suitable vessels and adequate financing have been acquired. An appropriate order will be entered, which will remain in effect for a period of 1 year after termination of the court proceeding, during which period transferee may submit appropriate certification that such vessels and financing have been acquired, whereupon an appropriate certificate superseding the certificate transferred shall be issued.

Findings. Upon reconsideration, we find that the transfer to Pittsburgh Towing Company of the certificate issued in No. W-364 to Charles Zubik on January 18, 1943, was properly approved; that the order of September 9, 1960, by Division 4, should be affirmed; and that upon termination of the suit to review the orders of April 9, 1963, and December 19, 1963, by Division 3, and upon certification

to the Commission that suitable vessels and adequate financing have been acquired to perform the water carrier service authorized, an appropriate certificate superseding the certificate transferred shall be issued.

An appropriate order will be entered.

VICE CHAIRMAN BUSH concurs in the result.

COMMISSIONER MURPHY, dissenting:

For the reasons indicated in my dissenting expression to the prior report, I am constrained to dissent herein since the same conclusions are reached via the same line of reasoning. In addition, however, I wish to point out that the instant report puts in question the ultimate usefulness of the rules and regulations prescribed by the Commission. Section 306.4(b) of our Transfer Rules requires, among other things, that applications for transfer produce "copy of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the proposed transfer." The order of September 9, 1960, approving the transfer to transferee was based on misrepresentations and without essential information, which was withheld from the application. It matters not whether Division 4, when it issued the order of September 9, 1960, would have denied the same if all the material facts had been disclosed to it. What does matter is that Zubik and Osbourne had entered into a contract for sale of transferee stock prior to the filing of the application and failed to disclose the existence of such a contract in the application. In *Communications Comm'n.* v. *WOKO,* 329 U.S. 223, the Supreme Court held that denial of a license by the Commission was justified even though the Commission failed to find that the concealment was of material facts or had influenced the Commisison in making any decision or that it would have acted differently had it known the true facts.

If we are to expect future applicants for transfer of operating authority, or for that matter anyone who files pleadings before the Commission, to respect and abide by our rules and regulations, we should not give lip service to these rules and regulations as is being done herein.

I must also comment on the finding in the report that there is considerable futility in any regulations relating to dormant rights and that there will continue to be until Congress sees fit to write Part III revocation power into the law. Section 312 requires the Commssion in passing on transfers of certificates or permits to prescribe regulations which will provide "protection of the public interest." The position taken by the majority is a denial of its responsibility to protect, in the public interest, existing and continuing water carrier operations. The economic impact of the reactivation of dormant water carrier operating rights upon existing water carriers is a serious problem. Simply because Congress has not seen fit to confer upon the Commission the ultimate power of revocation is not sufficient reason for the Commission to abdicate its effective power under the transfer provisions of the act. Intervening certificated carriers have substantial investments in floating equipment and other property, and have floating equipment, both towboats and barges, in excess of the requirements of the traffic now available or anticipated in the foreseeable future. In additions, there are 10 other common carriers presently holding certificates to perform towage service on all or a portion of the Ohio River. Contrary to the statement in the report that transferee's operations have not had any material adverse effect on interveners, the record shows that all three interveners experienced a decline in traffic on the Ohio River and in their gross revenues in 1961, which they attribute to the competition of transferee during its first year of operation. Although we do not have the power to revoke a dormant water carrier certificate, we certainly should make an attempt where we do have the power to protect

the common carrier operations of other lines in the area which have been continuous and have provided all the transportation required by the shippers. The effect of the institution of operations under rights which have not been exercised over a long period of time is practically the same as would result from an authorization of a new service in competition with existing carriers. Operations under the certificate in question had been suspended for 16 years and no valid reasons, as required by our transfer regulations, were presented to show that it was due to circumstances over which the holder had no control. A mere desire on the part of a prospetcive purchaser of bare operating rights, with no equipment, to engage in what in effect amounts to a new service, unsupported by a scintilla of evidence of a need therefor, does not warrant approval of an application that flouts our regulations and will allow the institution of operations which will promote unsound economic conditions among the carriers in the area.

COMMISSIONER BROWN, dissenting:

I disagree with the majority and in my opinion we should not approve the transfer of this water carrier certificate. At the time of the issuance of the Division 4 order on September 9, 1960, approving the transfer, the record failed to contain any evidence, financial or otherwise, that would show the transferee able to conduct the water carrier service authorized under the certificate sought to be transferred. Likewise, the record disclosed that the operations had been dormant for over 10 years.

The order of Division 3, of September 13, 1961, reopened the proceeding for further consideration and assigned the matter for hearing, without any limitation. I therefore believe that it is incumbent upon us to consider this matter *de novo*. There is no question that the Commission has a right to reopen a proceeding where, as here, there has been a nondisclosure of the officers and directors of the trans-

feree. Compare *Abco Moving & Storage Co., Inc.—Purchase—Dierking,* 47 M.C.C. 557.

The two main issues presented here are (1) whether the transfer would be approved in view of the dormancy problem presented, and (2) whether the transferee has shown that it is fit and able to perform the service authorized by the operating rights sought to be transferred. With regard to dormancy, where there has been a cessation of operations over a substantial period of time, as here, the rule is that a transfer such as this will not be approved unless the holder of the rights shows that the cessation or suspension of operations was caused by circumstances over which the holder had no control. In this case the holder of the operating rights, Charles Zubik, clearly failed to show that the cessation of operatioins was beyond his control. Division 3 in the prior report, 317 I.C.C. 661 at page 662, appears to have attempted to close this evidential gap by taking official notice of economic conditions in the late 1940's and their effect on the water carrier industry in general. However, the fact is that Zubick's competitors maintained equipment and conducted substantial operations throughout this same period and up to the present time. It, therefore, appears that official notice was taken of nonexistent conditions. Additionally, Zubik had the burden of proving this point and, based upon the evidence of record, it is apparent that he failed in this regard.

As to the fitness of the transferee, it has no equipment and from its financial statement it appears to be insolvent. No equity capital has been invested in the company and it has no real estate or other fixed assets. In the circumstances, it is my belief that transferee has failed to show that it is fit and able to provide the service in question. Accordingly, I would deny the transfer.

COMMISSIONERS FREAS and GOFF dissent.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 19th day of March, A. D. 1965.

Finance Docket No. 21193

PITTSBURGH TOWING COMPANY—CERTIFICATE TRANSFER—CHARLES ZUBIK

It appearing, That on September 9, 1960, the Commission, Division 4, entered its order in the above-entitled proceeding, approving the transfer under section 312 of the Interstate Commerce Act;

It further appearing, That upon hearing and further consideration, the Commission, Division 3, made and filed its report, 317 I.C.C. 661, and order of April 9, 1963, affirming the order approving the transfer;

It further appearing, That by order of December 19, 1963, the Commission, Division 3, acting as an Appellate Division, denied a petition for reconsideration;

It further appearing, That on January 8, 1964, in Civil Action No. 64 C 3(1), *Mississippi Valley Barge Line Company* v. *United States,* to review the last two of the above-mentioned orders, the United States District Court for the Eastern District of Missouri, Eastern Division, temporarily enjoined issuance of a certificate superseding the certificate transferred;

It further appearing, That by order of February 18, 1964, the above-entitled proceeding was reopened for reconsideration on the present record and for amplification of policy matters involved regarding the transfer of water carrier certificates;

It further appearing, That a stipulation was lodged with the court that the certificate will not be issued until the further order of the court;

And it further appearing, That reconsideration of the matters and things involved has been given and the Commission on the date hereof has made and filed its report on reconsideration herein, containing its findings of fact and conclusions thereon, which report and the said report of April 9, 1963, are hereby referred to and made a part hereof:

It is ordered, That transferee's petition to vacate and set aside the order of February 18, 1964, be, and it is hereby, denied;

It is further ordered, That the order of September 9, 1960, approving the transfer to Pittsburgh Towing Company of the certificate issued in No. W-364 to Charles Zubik on January 18, 1943, be, and it is hereby, affirmed; and that the said order shall remain in full force and effect;

It is further ordered, That upon termination of the above-mentioned court proceeding and upon certification to the Commission that suitable vessels and adequate financing have been acquired to perform the authorized water-carrier service, a certificate be issued to transferee superseding the certificate transferred;

It is further ordered, That unless compliance is made by transferee with the condition described in the next preceding paragraph herein, within 1 year after termination of the court proceeding, or within such additional time as may be authorized by the Commission, the order of September 9, 1960, shall be of no further force or effect;

And it is further ordered, That this order shall be effective upon termination of the court proceeding.

By the Commission.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

A true copy:

BERTHA F. ARMES
Acting Secretary of the Interstate Commerce Commission

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